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In The
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-262

WILLIAM M. O'KEEFFE, Deputy Commissioner, Sixth Compensation District, Department of Labor,
Petitioner,

versus

AEROJET-GENERAL SHIPYARDS, INC., and THE HOME INDEMNITY COMPANY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner seeks review of the Circuit Court of Appeals' decision, apparently on the basis that an important federal question has been decided and perhaps also on the basis that there is a conflict with prior decisions of this Court and other circuit courts of appeals.

The question involved is the propriety of an order of the petitioning Deputy Commissioner modifying his prior final

order. It is extremely important that the status of the claim at the time of the entry of the modifying order be recognized. In the first order (Pages 34 & 35 in Appendix D of the Petition) the Petitioner found from conflicting medical evidence that the claimant's condition was not related to his employment. Hence, there was no question in the proceedings leading to the modification as to whether the unrelated condition had changed, one of the two grounds in the statute for modification.

Therefore, the only issue was whether there was a mistake in a determination of fact made when the original order was entered.

The Circuit Court agreed with Respondents that *no new evidence was presented* during the proceedings for modification, only evidence of a cumulative nature and a report by a supposed expert selected by Petitioner who merely reviewed the medical records of the claimant available at the original hearing, and Petitioner with amazing and commendable candor states that the question involved is whether a deputy commissioner may modify his prior order under 33 U.S.C. 922, "upon reconsideration of the evidence along with additional, but cumulative, evidence". (Page 2 of Petition) It is obvious that Petitioner is admitting that he reconsidered the original evidence and received some additional evidence, but the additional evidence was only cumulative, that is, *it added nothing new.*

Petitioner concludes by urging that the decision will impair the administration of the compensation program. The decision only follows the already existing rule that a modifying order cannot be entered unless there is some new evidence showing that a change of condition has occurred since the prior order or a mistake in a determination of fact did

occur when the prior order was entered. Surely this basic requirement will not disturb the administration of the compensation program, nor cast on a party or a deputy commissioner any undue burden. Further, it is obvious that the decision does not decide such "an important question of federal law" as Rule 1(b) contemplates.

Two cases are cited by Petitioner, supposedly to show that conflicting decisions have been rendered by other Circuit Courts of Appeals. (at Page 9 of Petition) *Bethlehem Shipbuilding Corporation v. Cardillo*, 102 F.2d 299 (CA 1), and *Luckenbach Steamship Co., Inc. v. Norton*, 106 F.2d 137 (CA 3).

The *Bethlehem* opinion, at page 301, clearly observes that the deputy commissioner entered his modification order "after a hearing and the submission of *new* evidence *and* that taken by Deputy Monahan (the prior deputy)".

In addition, the deputy there found also there was a definite change in condition of the claimant. We do not see any conflict with the decision here where the Circuit Court found:

> "We think it is equally clear that at the second hearing *no new evidence* was presented which showed mistake in a determination of fact." (Page 18 & 19 of Appendix A in Petition)

The *Luckenbach* case only recognizes the rule of disfavoring a strict interpretation of the modification section where the Deputy entered an order finding only that the previously recognized partial disability was permanent. In essence this was really only the final order in the *original* proceedings.

Banks v. Chicago Grain Trimmers Assoc., 390 U. S. 459, 20 L.Ed.2d 30, 88 S.Ct. 1140, a decision of this Court cited by Petitioner is totally different. A widow filed a claim asserting her husband died on January 30 as a result of a work-

connected injury occurring on *January 26.* The claim was denied. Later, a *new eyewitness* was discovered who described another work-connected accident on *January 30.* It is obvious that a subsequent award could be justified under the modification statute because of the appearance of a *new* eyewitness with *new* evidence pertinent to the cause of the death of the claimant's husband. Again, there is no conflict with this decision.

No "special or important" reason exists for this Court to review the sound decision of the Circuit Court. It neither conflicts with an existing decision, nor does it decide an important question of law. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO CERTIFY that three (3) copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit, have been furnished to the Solicitor General, U. S. Department of Justice, Washington, D. C. 20530, by United States Mail, this 18th day of October, 1971.

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Attorney